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COURT OF CRIMINAL APPEALS
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No. PD-0268-21

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
12/7/2021
DEANA WILLIAMSON, CLERK

DARYL JOE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Navarro County

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STATE'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other resources

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant got caught attaching a trailer full of mattresses to his truck. The mattresses were cargo by definition because the trailer was located somewhere other than where the mattresses were loaded. He is guilty of theft because he exercised control over them. This also means he possessed them, as also required by statute. That makes him guilty of cargo theft.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF FACTS[1]

Corsicana Bedding makes mattresses and box springs (mattresses).[2] Completed mattresses are moved to the shipping dock area where they are loaded into trailers.[3] Once a trailer is loaded, paperwork is placed inside and the doors are sealed.[4] Once a trailer leaves the shipping dock, its contents become the purchaser's property.[5] The trailer is then shuttled by a small towing vehicle to a temporary lot.[6] It sits there until a carrier company's truck arrives.[7] The carrier's driver breaks the seal to confirm the paperwork and reseals it before the goods continue to their destination.[8]

Appellant drove a semi-truck into the temporary lot.[9] He backed it under a trailer.[10] The truck's fifth-wheel hitch automatically connected the truck to the

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[1] These are only the facts pertinent to this sufficiency review. TEX. R. APP. P. 38.1(g). They are stated in the light most favorable to the verdict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[2] 3 RR 99-101, 150

[3] 3 RR 101, 117.

[4] 3 RR 101-03.

[5] 3 RR 103.

[6] 3 RR 99-100, 102-03.

[7] 3 RR 119, 122-23. Corsicana Bedding contracts with JB Hunt to contract with outside carriers on its behalf. 3 RR 122-23.

[8] 3 RR 117-18.

[9] 3 RR 114.

[10] State's Exs. 6-9 (photographs of truck).

trailer.[11] Appellant was interrupted by a Corsicana Bedding employee before the additional steps necessary to haul the trailer away were completed.[12]

SUMMARY OF THE ARGUMENT

There are ultimately two elements of cargo theft at issue: whether appellant exercised control over the goods and whether those goods were "moving in commerce" such that they were "cargo." By acting as one with authority to dispose of the goods by connecting his truck to the trailer containing them, appellant exercised control over them. And because the trailer had already moved from the point at which it became a commercial shipment, its contents were "cargo."

ARGUMENT

I. What issues are properly before this Court?

The issue granted review is, "Whether the court of appeals Tenth District erred in holding the evidence legally sufficient to support Petitioner's conviction for the offense of theft of cargo?"[13] Appellant summarizes his argument to include two points. First, the goods weren't "cargo" because they had not moved from their point of origin as required by statute.[14] Second, if the goods were "cargo," appellant never

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[11] 3 RR 149, 152.

[12] 3 RR 153-54, 157, 179-80.

[13] PDR at 1.

[14] App. Br. at 9.

possessed them because he did not complete the process of hooking the trailer to his truck.[15] These are the arguments the court of appeals decided against him.[16] In his "possession" argument, however, appellant explicitly or implicitly raises related sufficiency arguments that are not properly before this Court for various reasons.

First, appellant's "possession" argument rests partly on the claim the State alleged "hooking up the truck" but did not prove appellant completed that act.[17] This factual argument serves his larger argument that the inability to move the trailer shows he never possessed it. His repeated emphasis on the indictment's language, however, could lend itself to a variance argument.[18] If that was his intent, he never invoked applicable law or otherwise explained how the difference between "hooking up" and "attempting to hook up" (assuming he is correct) impaired his defense or subjected him to further prosecution for the same offense.[19] Moreover, the Tenth Court rejected this factual argument on its face,[20] and appellant has neither

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[15] App. Br. at 9-10.

[16] *Joe v. State*, 620 S.W.3d 834, 837-38 (Tex. App.—Waco 2021, pet. granted).

[17] App. Br. at 17-21.

[18] *See Johnson v. State*, 364 S.W.3d 292, 298-99 (Tex. Crim. App. 2012) (explaining which variances between pleadings and proof are always, sometimes, or never material; the failure to prove non-statutory manners and means is usually not material).

[19] *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001) (adopting this materiality standard used by the Fifth Circuit).

[20] *Joe*, 620 S.W.3d at 837-38 (holding that "hooking up" was proven and also that asportation (and thus the ability to asportate) is irrelevant to proving possession). Implicit in its first conclusion (continued...)

complained that his argument was misconstrued or ignored, or otherwise briefed a variance argument.[21] As appellant has not altered his briefing in light of that holding, variance is presumably not intended to be part of his sufficiency argument and would not be adequately briefed regardless.

Second, assuming theft/possession, appellant argues he is not guilty of cargo theft for the same reason a common shoplifter cannot be guilty of organized retail theft: the statute requires conduct in addition to theft.[22] Appellant presented this argument to the Tenth Court, but it was not addressed.[23] Appellant's petition did not ask for a summary remand under TEX. R. APP. P. 47.1, nor is he seeking that now. Instead, he wants this Court to decide this sub-issue in his favor. This Court does not typically decide matters that were raised in the court of appeals but not decided.[24] It

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[20](...continued)
is that "hooking up" is not a term of art; rational jurors could decide connecting the hitch is sufficient. *Cf. Denton v. State*, 911 S.W.2d 388, 390 (Tex. Crim. App. 1995) (juries should be permitted to read undefined statutory language to have any meaning acceptable in common parlance).

[21] With a few differences—more subheadings, less sufficiency law, and expanded dictionary references—appellant's brief to this Court is the same as his lower court brief and petition.

[22] App. Br. at 17-18 (citing *Lang v. State*, 561 S.W.3d 174, 183 (Tex. Crim. App. 2018)).

[23] *See* App. CoA Br. at 18-19. In fairness to that court, this argument was not set off as distinctly as it is before this Court. For background, this case was tried in May of 2018, a year after Lang's conviction was upheld by the Third Court of Appeals, *Lang v. State*, 03-15-00332-CR, 2017 WL 1833477 (Tex. App.—Austin May 5, 2017), rev'd and remanded, 561 S.W.3d 174 (Tex. Crim. App. 2018), but before this Court reversed in November of 2018.

[24] *Sotelo v. State*, 913 S.W.2d 507, 510 (Tex. Crim. App. 1995) ("[T]he proper disposition of a petition for discretionary review that correctly asserts that the lower court has failed to consider (continued...)

should not do so now.[25]

II. Appellant stole goods by exercising control over them.

A. Proof of theft equals proof of possession.

Appellant argues that he never possessed the goods because he never exercised control over the trailer.[26] In this case, exercise of control is the same inquiry for both material elements—possession and "stolen." Put another way, one cannot steal something without possessing it.

As charged, cargo theft is the commission of certain intentional or knowing acts relative to "stolen cargo."[27] The intentional or knowing act alleged in this case

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[24](...continued)
a complaint as to the propriety of its ultimate disposition is for this Court, in the exercise of its supervisory authority, to remand the cause to the court of appeals to reach a 'decision' on that question in the first instance.").

[25] More importantly, the possibility of appellant's success on that issue would not render this petition moot. Acquittal based on analogy to *Lang* would require the court of appeals to consider reformation to the submitted lesser-included offense of attempted cargo theft, 1 CR 83-84, which would also depend on the definition of "cargo." It might also depend on whether appellant stole the trailer or merely attempted to. Both issues before this Court could thus impact this case on remand. On that last point, the degree of exercise of control necessary for theft is a source of disagreement outside the narrow confines of cargo theft. In this lower court, for example, the position voiced by Chief Justice Gray and adopted by appellant is not new. *See Brown v. State*, No. 10-17-00104-CR, 2018 WL 5849744, at *4 (Tex. App.—Waco Nov. 7, 2018, pet. ref'd) (defendant could not be a party to theft of cattle because primary actor completed their theft when he closed the gate to the owner's roadside pen area that morning and drove away to plan their removal later that night); *id.* at *5 (Gray, C.J., concurring with note) (evidence of appropriation by exercising control was "weak"). The bench and bar would benefit from a resolution.

[26] App. Br. at 20.

[27] TEX. PENAL CODE § 31.18(b)(1)(A) ("A person commits an offense if the person:
(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of: (A) stolen cargo[.]").

was possession.[28] "Stolen cargo" is cargo obtained by theft.[29] Theft is the unlawful appropriation of property with intent to deprive the owner of it.[30] Applicable here, "appropriate" means "to acquire or otherwise exercise control over property other than real property."[31] "Possession" means "actual care, custody, control, or management."[32] As this Court said in *Poindexter v. State*, control is something to be exercised.[33] The concept of possession being an exercise of control predates the 1974 Penal Code, and this Court framed possession as something to be exercised as recently as two years ago.[34] In this case, then, there is no difference between arguing appellant never stole the goods in the trailer and appellant never possessed the goods. Both are based on his exercise of control. If he did one, he did the other. That was the point of *Lang v. State*, upon which appellant relies.[35]

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[28] 1 CR 16.

[29] TEX. PENAL CODE §§ 31.01(7) (in Chapter 31, "steal" means "to acquire property or service by theft."), 1.07(b) ("The definition of a term in this code applies to each grammatical variation of the term.").

[30] TEX. PENAL CODE § 31.03(a).

[31] TEX. PENAL CODE § 31.01(4)(B).

[32] TEX. PENAL CODE § 1.07(a)(39).

[33] *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), abrogated on other grounds by *Robinson v. State*, 466 S.W.3d 166 (Tex. Crim. App. 2015).

[34] *Beltran De La Torre v. State*, 583 S.W.3d 613, 619 (Tex. Crim. App. 2019) ("The State was free to argue the concept of joint possession—that is, that Appellant exercised 'actual care, custody, control, or management' over the drugs along with the other individuals present.").

[35] 561 S.W.3d at 181, 183 (holding the organized retail theft statute, which requires possession (continued...)

B. Appellant committed a theft.

Although the core question with either theft or possession comes down to exercise of control, it is helpful to frame the analysis as a question of "theft or attempted theft?"

Appellant committed theft because a rational jury could have defined "exercise control" to include what he did. "Exercise control" is undefined. Undefined terms that have not acquired a technical definition are to be viewed in their ordinary sense.[36] The jury is allowed, but not required, to consider the full range of a term's ordinary meaning when deciding guilt.[37] This jury found appellant exercised control over the trailer/goods. By beginning the hook-up process, appellant acted as one who had not just the ability to dispose of the trailer but the right. He treated the trailer as though it was his. That he failed to move it is irrelevant. As this Court has recognized for decades, one can exercise control over property with the requisite intent to commit theft without leaving the owner's premises.[38] Viewed against this Court's extensive

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[35](...continued)
of stolen retail merchandise, does not apply to ordinary shoplifters because possession is "inherent" in shoplifting).

[36] *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012).

[37] *Id*.

[38] *State v. Ford*, 537 S.W.3d 19, 24 (Tex. Crim. App. 2017) ("[I]t was not necessary for appellee to take the items out of the store for her to commit a theft."); *Hill v. State*, 633 S.W.2d 520, 521 (Tex. Crim. App. 1981) (orig. op.) ("[I]t is not essential that the property be taken off the premises; it is instead only essential that the evidence show an 'exercise of control over the
(continued...)

jurisprudence on theft (and in the light most favorable to the verdict), it appears plain that the cargo was stolen as soon as appellant began the process of connecting the trailer to his truck. Members of this Court might have decided it differently had they been jurors, but this Court cannot say the jury was wrong without giving "exercises control" a technical meaning (at least for sufficiency purposes) it has never had.

C. Calling this an attempt is a rhetorical argument fit for trial.

Appellant, adopting Chief Justice Gray's dissent, argues that if he is guilty of anything it is attempted theft.[39] There is an argument that a rational jury could have decided appellant did not exercise control over the trailer/goods. A similar argument formed the basis for the holding in *Bullock v. State*.[40] In *Bullock*, this Court said a rational jury could believe that a defendant who entered another's truck without permission and sat in the seat but did not touch the pedals or controls or start the truck did not exercise control over it.[41] But *Bullock* was a lesser-included case. The standard for entitlement is whether, viewing the evidence in the light most favorable

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[38](...continued)
property,' coupled with an 'intent to deprive the owner of the property.'"). This has long been the law in Texas. *See* TEX. PENAL CODE arts. 1410 (1948) (defining "theft" in part as "the fraudulent taking of corporeal personal property belonging to another from his possession"), 1412 (entitled "Asportation not necessary" and stating "taking" does not require removal of the property, only "that it has been in the possession of the thief" even if in the presence of the owner), 1415 (defining "possession" in part as "the exercise of actual control, care, and management").

[39] App. Br. at 21.

[40] 509 S.W.3d 921 (Tex. Crim. App. 2016).

[41] *Id*. at 928-29.

to the request, a rational jury could find the defendant was guilty only of attempted theft.[42] That is far different from a sufficiency review which asks whether, viewing the evidence in the light most favorable to the verdict, no rational jury could find him guilty of theft. And that is what appellant must say is the case: not only could he be found guilty of attempt, he could not have been guilty of anything more. Whatever *Bullock*'s import, this Court has since reiterated the view that property can be controlled without going anywhere or getting away with it for any amount of time.[43]

Given the potential breadth of the meaning of "exercise control," it is fair to ask whether one can merely attempt a theft once he has physically interacted with another's property in any meaningful way. This question is as much philosophical as legal.[44] Maybe the answer post-*Bullock* is that, in a case in which the jury gets to define the prohibited act, attempt is always a valid rational alternative. Even if that were the case, however, all that does is force a trial court to submit the instruction upon request. It does not compel (or even support) a directed verdict or appellate acquittal for lack of exercise of control.

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[42] *Id*. at 925.

[43] *Ford*, 537 S.W.3d at 24 (upholding probable cause for theft because placing items inside one's purse while still in the store is an exercise of control).

[44] *See Bullock*, 509 S.W.3d at 932-33 (Newell, J., op. on denial of reh'g) ("I would leave for another day the philosophical questions about what amounts to an act in furtherance of appropriation of a truck and whether there can even be an offense of attempted theft.").

III. The stolen goods were "cargo."

"Cargo," as defined in Section 31.18,

> means goods, as defined by Section 7.102, Business & Commerce Code, that constitute, wholly or partly, a commercial shipment of freight moving in commerce. A shipment is considered to be moving in commerce if the shipment is located at any point between the point of origin and the final point of destination regardless of any temporary stop that is made for the purpose of transshipment or otherwise.[45]

When a term is defined, courts should focus on the text to "attempt to discern the fair, objective meaning of that text at the time of its enactment."[46] The literal text is central "because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law."[47] Only if this plain language would lead to absurd results or is ambiguous, "*and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extratextual factors as executive or administrative interpretations of the statute or legislative history[,]" Code Construction Act notwithstanding.[48] When reading the literal text, words and phrases are read in context and construed according to the rules of grammar and common

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[45] TEX. PENAL CODE § 31.18(a)(1).

[46] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[47] *Id*. (emphasis in original).

[48] *Id*. at 785-86, 786 n.4 (emphasis in original). *See* TEX. GOV'T CODE § 311.023 (courts may consider extratextual sources "whether or not the statute is considered ambiguous on its face").

usage.[49]

A. The only question is what "point of origin" means.

"'Goods' means all things that are treated as movable for the purposes of a contract for storage or transportation."[50] The mattresses in the trailer were goods. By the time the trailer was sealed up with paperwork giving title and constructive possession to a purchaser, those goods were commercial.[51] Appellant does not appear to dispute this. If "moving in commerce" were not defined, it would be tempting to view it figuratively and conclude the goods constructively "moved" in commerce once ownership transferred. But "moving in commerce" is defined literally as a function of location. It is undisputed the trailer was moved from the shipping dock, where its contents stopped being inventory and became a shipment of commercial goods. The question is whether doing so placed them "at any point" other than the point of origin.

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[49] *Lang*, 561 S.W.3d at 180.

[50] TEX. BUS. & COM. CODE § 7.102(a)(7).

[51] *See* https://www.merriam-webster.com/dictionary/commerce def. 2 ("the exchange or buying and selling of commodities on a large scale involving transportation from place to place"), last checked 11/29/21; https://www.dictionary.com/browse/commerce def. 1 ("an interchange of goods or commodities, especially on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce); trade; business."), last checked 11/29/21. As the court of appeals pointed out, the paperwork transferring title can be described as a bill of lading. *Joe*, 620 S.W.3d at 836-37. *See also* TEX. BUS. & COM. CODE § 1.201(b)(6) (codifying the Uniform Commercial Code's definition of "bill of lading" as "a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt."). Whether the mattresses were commercial goods before this point is not at issue.

B. The point of origin for movement is where movement begins.

"Any point" is effectively defined as anywhere not the "point of origin" or "final point of destination." A point describing location could be anything. In theory, these terms could refer to the cities marking the beginning and ending of the transportation.[52] However, defining the terms at such low resolution would remove cross-town shipment from the statute's ambit. That result would be absurd. Common sense (and appellant) suggests a more granular approach.

Appellant appears open to the possibility that the final point of destination for a consumer good could be the end-user's home.[53] That is, a good moves in commerce until it stops for good. That would be a reasonable interpretation if the end-user purchased the entire "shipment," as that is what "mov[es] in commerce" under the definition of "cargo."[54] Along these lines, appellant also suggested in his consumer-goods example that Wal-Mart could be the final destination.[55] That makes sense. The place where the shipment's movement ends is logically the final point of destination.

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[52] *See*, *e.g.*, *Texarkana & Ft. S. Ry. Co. v. Brewer*, 19 S.W.2d 334, 336 (Tex. Civ. App.—Beaumont 1929, no writ) ("The original shipment was from Chasmore, La., over the L., C. & N. and T. & N. O. Railways to Beaumont, Tex. . . . At the time the car was shipped from Chasmore, La., the point of origin, there was no other definite point of destination in the mind of the shipper than Beaumont, Tex.").

[53] App. Br. at 15.

[54] TEX. PENAL CODE § 31.18(a)(1) ("A shipment is considered to be moving in commerce if . . .").

[55] App. Br. at 15.

That would typically be a retailer's receiving dock. It is also logical to treat the beginning of the movement the same: the point of origin is wherever the shipment starts moving. In this case, the shipment's movement started at Corsicana Bedding's shipping dock.

Instead of embracing this symmetry, Appellant argues that all points within Corsicana Bedding's property are the "point of origin." It is not clear why that must be so. Why is the property or fence line significant? To use his example, has a shipment stopped "moving in commerce" when the truck turns into Wal-Mart's parking lot? No, it moves until it stops being shipped. Similarly, it starts moving at the point in space and time the shipment starts moving. The size of the property where this movement begins or ends is irrelevant.

This case shows why. Third-party carriers enter Corsicana Bedding's property all the time. That means purchasers can, through agents, take physical possession of goods they already have legal title to on Corsicana Bedding's property. It borders on the absurd that commercial goods that have physically moved under such circumstances are not "moving in commerce" until a carrier drives off the lot.[56] Although basing liability on what side of an imaginary line the actor is on is not unheard of—see criminal trespass—an interpretation of "point of origin" that encourages trespass (or burglary, if the originator temporarily moves the shipments

[56] This result would also be absurd if "moving in commerce" had a more figurative meaning.

to a building) to avoid cargo theft's value ladder makes little sense.

The previous example illustrates the incongruence of a boundary-based definition with third-party carriers, but it ultimately does not matter who does the moving. If Corsicana Bedding shipped its product instead of using outside carriers, the trailer might have gone straight from the shipping dock to the roadways. Once it left the dock, it would have been "moving in commerce" just as if a third-party carrier had hauled it. Waiting until Corsicana Bedding's truck touched public asphalt would serve no purpose. That being the case, including a temporary stop in the yard for some other carrier to take it on the next leg of the journey makes no difference. It has "moved in commerce" either way.

In the context of a term based on movement, this interpretation is the fair, objective meaning of what the legislators who voted on the statute's text would have understood it to mean. Any interpretation that focuses on anything other than the very points in space where movement began and ended is arbitrary and would lead to unnecessary fights over technicalities. What if there is no fence or other clear demarcation of the property line? What if the originator parks it on a public street for a carrier to pick it up? What if it is moved down a public street to different company property a few blocks away? All of those problems are avoided by accepting a plain reading of the statute: something is "moving in commerce" when it is literally

"located at any point between" where the shipment's movement begins and where it ends.

C. No extratextual source compels a different conclusion.

Appellant's argument is predominantly based on fulfilling the purpose of the statute as evinced by the bill's author.[57] This was a mistake for two reasons.

First, legislative history should not be consulted unless the plain language produces absurd results or the statute is ambiguous. His "absurdity" argument is circular; of course a point is not between the points of origin and final destination if you define "point of origin" to include the point at issue.[58] And appellant does not contend the term is ambiguous—that word does not appear in his brief. He simply claims the court of appeals is wrong based on some dictionary terms and the legislative history he should not have considered. Moreover, the fact of disagreement over the best reading of the plain language is not an implicit ambiguity argument. A statute or term is not ambiguous simply because two people with bar cards disagree about its meaning. It could be, as in this case, that one of the parties is wrong.

Second, if one were to look to the legislative history, they would find no guidance. The stated purpose of Section 31.18 was to 1) sidestep problems of when

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[57] App. Br. at 15-17.

[58] App. Br. at 15.

authorized drivers' appropriation of goods exceeded the scope of consent, and 2) enable prosecution of organized theft rings without dealing with the hurdles associated with Section 71.02, engaging in organized criminal activity.[59] Appellant says neither purpose is furthered by a literal reading of the statute.[60] That's not true; because the definition of "cargo" and thus "point of origin" applies to the entire offense, a defendant should be able to violate the statute by "caus[ing] the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo"[61] while on the manufacturer's property. But it also misses the point. The legislative history does not militate in favor of appellant's interpretation, either. The fact that most prosecutions—of big or little fish[62]—will be based on conduct that occurs outside the confines of a manufacturer's property does not make excluding conduct committed on the property necessary or even desirable.

IV. Conclusion

Appellant committed a theft when he exercised control over Corsican Bedding's trailer full of commercial goods. This same exercise of control means he

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[59] https://lrl.texas.gov/scanned/srcBillAnalyses/84-0/SB1828INT.PDF (Senate Research Center Bill Analysis (Introduced), 4/20/15).

[60] App. Br. at 16.

[61] TEX. PENAL CODE § 31.18(b)(2)(B).

[62] App. Br. at 16 ("Appellant was charged under the section which was designed to get the other actors – the bigger fish.").

possessed it as required by the offense. The commercial goods were "cargo" because the point at which he exercised control over them was between where the shipment began and where it would have ended. If there is any reason why appellant should be acquitted of cargo theft, it will be because the statute requires conduct that is not inherent in theft—not because of geography. That should be decided in the first instance on remand after the issues presented to this Court are settled.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals and remand for consideration of appellant's remaining issue.

Respectfully submitted,

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/s/ John R. Messinger
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